

Internal Revenue Service

**memorandum**

TL-N-4068-88

CC:TL:TS/MKEYES

date: **26 MAY 1988**

to: District Counsel, Dallas SW:DAL  
Attn: Gary Kallevang, Attorney

from: Director, Tax Litigation Division CC:TL

subject: [REDACTED]

This memorandum is in response to your request of March 2, 1988, for our comments concerning your proposed decision document to be filed with the Tax Court in the above-referenced case.

ISSUE

What procedures should be followed in settling a TEFRA partnership case, as well as an individual partner's case, when both a statutory notice of deficiency and an FPAA were issued for potential partnership adjustments and the taxpayer, also the TMP, filed a petition solely based upon the statutory notice?

CONCLUSION

We disagree with the procedure suggested by you for settlement of this case since the Court lacks jurisdiction over the partnership items. We recognize that you are concerned that part of the reason why petitioners may not have filed a petition for the partnership items, may be due to the confusion created by the Service in issuing both a statutory notice of deficiency, as well as an FPAA, however, the procedures you suggest for settlement are inappropriate. The Tax Court is a court of limited jurisdiction and their powers do not include equity powers. The Court does not have jurisdiction over partnership items unless an FPAA was petitioned on behalf of the partnership. The only appropriate procedure in this case is to file a motion to dismiss for lack of jurisdiction and to strike partnership items, and then to enter a decision for nonpartnership items. As the partners of [REDACTED] have defaulted on the FPAA, there

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is not much that the Service can do. The partners can, as you mentioned in your memorandum, file a refund claim for the difference between the default deficiency and the settlement position.

#### FACTS

On [REDACTED], a statutory notice for [REDACTED] was issued to petitioners regarding both partnership and nonpartnership items. On [REDACTED], petitioners received an FPAA for [REDACTED] involving the same partnership adjustments listed in the statutory notice of [REDACTED]. [REDACTED] was the TMP for the partnership. On [REDACTED], the [REDACTED] filed a petition based upon the statutory notice. A settlement offer was formulated by Appeals for all the [REDACTED] partnerships. At the [REDACTED], calendar call in Dallas, it was reported to the Court that a basis of settlement was reached. After the calendar call, it was discovered that [REDACTED] was a TEFRA partnership and that [REDACTED] had received an FPAA.

#### DISCUSSION

It is your proposal to settle the case in the following manner: (1) submit a stipulated decision document reflecting settlement of both partnership and nonpartnership items; (2) file a Motion For Entry of Decision or, in the Alternative, Motion for Entry of an Order to All Partners to Show Cause why the Decision should not be entered; and (3) have other partners of [REDACTED] execute a Form 870-P.

This procedure is inappropriate for several reasons. First, the Court has no jurisdiction over the partnership items as the statutory notice is invalid as far as it pertains to partnership items. See, Maxwell v. Commissioner, 87 T.C. 783 (1986). Secondly, the FPAA issued on [REDACTED], was never petitioned by the TMP or a notice partner, pursuant to I.R.C. § 6226(a) or (b) so as to give the Court jurisdiction over the partnership proceeding. To submit a decision document to the Court for items for which it has no jurisdiction over would be inappropriate. In most likelihood, the Court would probably not accept such a decision document because the Court lacks jurisdiction. Furthermore, if such a document was submitted and accepted by the Court, it would be subject to being vacated at any time, as a motion for lack of jurisdiction can be filed at any time. Brown v. Commissioner, 78 T.C. 215 (1982); Abeles v. Commissioner, 90 T.C. No. 8 (Jan. 22, 1988) (Court vacated decision almost three years after it was entered, as it related to wife, because the court lacked jurisdiction when the decision was entered).

I.R.C. § 6221 provides that the tax treatment of any partnership item shall be determined at the partnership level. This generally applies to any partnership formed after September 3, 1982. See Public Law 97-248 section 407(a). For there to be judicial review of an FPAA, a petition must be filed within 90 days by the TMP, and if the TMP doesn't file within the 90 day period; a notice partner must file within that statutory time framework, or the Tax Court lacks jurisdiction to hear the case. See I.R.C. § 6226(a) & (b). Case law is clear that, if partnership is a TEFRA partnership, the notice of deficiency procedures are inapplicable. Maxwell v. Commissioner, 87 T.C. 783 (1986). NCF Energy Partners v. Commissioner, 89 T.C. No. 51 (October 15, 1987).

Since [REDACTED] petitioned the Tax Court based upon the notice of deficiency issued to him on [REDACTED] the Court has jurisdiction over any nonpartnership items contained in the notice. The notice is invalid as it applies to partnership items, but the petition can be cured by filing a motion to strike the partnership items. See Maxwell v. Commissioner, Id.

In your memorandum you suggest that it could be argued that petitioners gave sufficient notice that they are contesting the partnership items and based upon that, the Court could deem the petition filed for both partnership and nonpartnership items. You further argue that a petitioner can file a single petition for more than one statutory notice. We agree that a petitioner can file a single petition for more than one statutory notice, but for reasons already discussed we do not agree that a petition can be based upon both an FPAA and a statutory notice. Your suggestion involves two separate statutorily prescribed procedures for the Court's jurisdiction and these procedures have different requirements, unlike the case where a petition based upon two or more statutory notices, each having the same statutory jurisdictional requirements.

The procedure which should be followed for settlement of the case is to file a motion to dismiss for lack of jurisdiction and to strike for the partnership items and then enter a decision only for the nonpartnership items. This settles the individual case for petitioners, [REDACTED]. As far as the partnership items are concerned, all the partners of [REDACTED] have defaulted, therefore, the only way for petitioners, as well as the other notice partners to receive the "cash out" settlement offered to other [REDACTED] partners, is by filing a claim for refund.

CONSISTENT SETTLEMENT

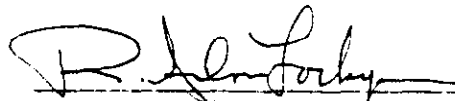
In your memorandum you mention that numerous other partners in other [REDACTED] had the benefit of the "cash-out" settlement and that it is unfair to default the partners of [REDACTED] on a technicality, when the same facts and legal issues are involved. It is important to note that the consistent settlement rules do not apply between partnerships in a tax shelter, but only between partners in the same partnership.

Under I.R.C. § 5224(c) a partner may request settlement terms which are consistent with those contained in a settlement agreement in respect to partnership items. The requirement for consistent settlement terms applies only if the items were partnership items for the partner entering into the original settlement immediately before the original settlement, and the items are partnership items for the party requesting the consistent settlement at the time the partner files the request Temp. Treas. Reg. § 301.5224(c)-3T. Therefore, there is no problem in complying with the TEFRA consistent settlement rule.

Should you have any questions regarding this matter, please contact Marina Reyes, Tax Shelter Branch on PTE 566-4174.

MARLENE GROSS

By:

  
R. ADAM LOCKYER  
Senior Technician/Reviewer